Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

BERNARD EGAN & COMPANY
and SUBSIDIARIES,

Petitioner,

v.

STATE OF FLORIDA DEPARTMENT OF REVENUE,

Respondent.

On Petition for Writ of Certiorari to The District Court of Appeal of The State of Florida Fourth District

PETITION FOR WRIT OF CERTIORARI

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49 pp

QUESTION PRESENTED FOR REVIEW

Whether inclusion of a foreign subsidiary's profits in a state's apportionable tax base, without inclusion of the factors that produced such profits in the apportionment formula, discriminates against foreign source income in violation of the Foreign Commerce Clause?

STATEMENT OF PARTIES

The caption of the case sets forth all parties to the proceeding in the District Court of Appeal of the State of Florida, Fourth District. There is no parent or publicly held company owning 10% or more of Petitioner's stock. Petitioner owns 100% of the stock of all of its subsidiaries.

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ENTERED OPINION

The opinion of the District Court of Appeal of the State of Florida, Fourth District, for which Petitioner seeks the review of this Court, is reported at 769 So. 2d 1060 (Fla. 2000) and set forth in the Appendix to this Petition. App. p.1.

STATEMENT OF JURISDICTION

The opinion of the District Court of Appeal of the State of Florida, Fourth District, was filed August 16, 2000. A timely Petition for Rehearing was filed, and subsequently denied on November 9, 2000. App. p.5. The mandate of the District Court of Appeal was issued December 1, 2000. App. p.6. A timely Petition for Certiorari was filed with the Supreme Court of Florida, which Petition was denied by order issued May 30, 2001. App. p.8. This Petition for Writ of Certiorari is timely filed on or before August 28, 2001.

Petitioner invokes the jurisdiction of this Court under 1257(a), Title 28 of the United States Code. At issue is the validity of a statute of the State of Florida on the grounds it is repugnant to the Constitution of the United States, and defies this Court's ruling in *Kraft General Foods, Inc. v. Iowa Department of Revenue and Finance*, 505 U.S. 71 (1982).

The Constitutional provisions, statutes, rules and regulations involved in this case are, in relevant part, as follows:

U.S. Const. art. 1 §8, cl. 3:

> "The Congress shall have power . . . to regulate commerce with foreign Nations . . .."

IRC §243 (1986, as amended):

DIVIDENDS RECEIVED BY CORPORATIONS.

(a) GENERAL RULE.—In the case of a corporation, there shall be allowed as a deduction an amount equal to the following percentages of the amount received as dividends from a domestic corporation which is subject to taxation under this chapter: . . .

(3) 100 percent, in the case of qualifying dividends (as defined in subsection (b)(1)).

(b) QUALIFYING DIVIDENDS.—

(1) IN GENERAL.—For purposes of this section, the term "qualifying dividend" means any dividend received by a corporation—

(A) if at the close of the day on which such dividend is received, such corporations is a member of the same affiliated group as the corporation distributing such dividend . . ..

IRC §245:

DIVIDENDS RECEIVED FROM CERTAIN FOREIGN CORPORATIONS. . . .

(c) CERTAIN DIVIDENDS RECEIVED FROM [FOREIGN SALES CORPORATIONS] FSC.—

(1) IN GENERAL.—In the case of a domestic corporation, there shall be allowed as a deduction an amount equal to—

(A) 100 percent of any dividend received from another corporation which is distributed out of earnings and profits attributable to foreign trade income for a period during which such other corporation was a FSC . . ..

(2) EXCEPTION FOR CERTAIN DIVIDENDS.—Paragraph (1) shall not apply to any dividend which is distributed out of earnings and profits attributable to foreign trade income which—

(A) is section 923(a)(2) nonexempt income (within the meaning of section 927(d)(6)) . . ..

IRC. §923:

EXEMPT FOREIGN TRADE INCOME.

(a) EXEMPT FOREIGN TRADE INCOME.—For purposes of this subpart—

(1) IN GENERAL. The term "exempt foreign trade income" means the aggregate amount of all foreign trade income of a FSC for the taxable year which is described in paragraph . . . (3) . . .

(3) INCOME DETERMINED WITH REGARD TO ADMINISTRATIVE PRICING RULES.—In the case of any transaction with respect to which paragraph (1) or (2) of section 925(a) (or the corresponding provisions of the regulations prescribed under section 925(b)) applies, 16/23 of

the foreign trade income derived from such transaction shall be treated as described in this paragraph.

IRC §927:

OTHER DEFINITIONS AND SPECIAL RULES.

. . .

(d) OTHER DEFINITIONS.—For purposes of this subpart— . . .

(6) SECTION 923(A)(2) NON-EXEMPT INCOME.—The term "section 923(a)(2) non-exempt income" means any foreign trade income . . . which is not exempt foreign trade income . . ..

IRC §951:

AMOUNTS INCLUDED IN GROSS INCOME OF UNITED STATES SHAREHOLDERS.

(a) AMOUNTS INCLUDED.—

(1) IN GENERAL.— . . . [E]very person who is a United States shareholder . . . shall include in his gross income, for the taxable year . . . —

(A) the sum of—

(i) his pro rata share (determined under paragraph (2)) of the corporation's subpart F income for such year . . ..

IRC §952:

SUBPART F INCOME DEFINED.

(a) IN GENERAL.—For purposes of this subpart, the term "subpart F income" means, in the case of any controlled foreign corporation, the sum of— . . .

(2) the foreign base company income (as determined under section 954) . . ..

IRC §954:

FOREIGN BASE COMPANY INCOME.

(a) FOREIGN BASE COMPANY INCOME.—For purposes of section 952(a)(2), the term "foreign base company income" means for any taxable year the sum of— . . .

(2) the foreign base company sales income for the taxable year . . ..

(d) FOREIGN BASE COMPANY SALES INCOME.—

(1) IN GENERAL.—For purposes of subsection (a)(2), the term "foreign base company sales income" means income . . . derived in connection with the purchase of personal property from a related person and its sale to any person . . . where—

(A) the property which is purchased . . . is . . . produced . . . outside the country under the laws of which the controlled foreign corporation is created or organized . . ..[1]

---

[1] The foreign sales corporation statutes recently were revoked and replaced by the extra territorial income exclusion provisions which have

Fla. Stat. §220.12:

> **"Net Income" defined.**— For purposes of this code, a taxpayer's net income for a taxable year shall be its adjusted federal income, or that share of its adjusted federal income for such year which is apportionable to this state [Florida] . . ..

Fla. Stat. §220.13 (1992, subsequently amended for tax years beginning after January 1, 1993):

> **"Adjusted federal income" defined.—**
>
> (1) The term "adjusted federal income" means an amount equal to the taxpayer's taxable income as defined in subsection (2), . . . adjusted as follows:
>
> (a) *Additions.*— . .
>
> [None applicable to Petitioner with respect to the tax years at issue]
>
> (b) *Subtractions.*— . . .
>
> [None applicable to Petitioner with respect to the tax years at issue]
>
> (2) For purposes of this section, a taxpayer's taxable income for the taxable year means taxable income as defined in s. 63 of the Internal Revenue Code and properly reportable for federal income tax purposes . . ..

Fla. Admin. Code r.12C-1.013(10)(b):

> "A subtraction for subpart F income, included for federal tax purposes under s. 951, I.R.C., is not al-

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essentially the same tax consequence of dividing the profits of a foreign subsidiary between included and excluded amounts of subpart F income.

lowed for taxable years beginning before January 1, 1993."

STATEMENT OF THE CASE

Petitioner is engaged in the business of selling produce in the United States through wholly owned domestic subsidiaries, and in foreign countries through a foreign subsidiary incorporated in the Virgin Islands. All corporations were part of a unitary business. During the years in question, part of the foreign subsidiary's profits were taxable to Petitioner for federal purposes under section 951 *et sequence* of the Internal Revenue Code ("subpart F"). For federal tax purposes, these profits were equivalent to a deemed dividend from a foreign subsidiary. In determining its Florida income, Petitioner excluded these amounts from its apportionable base income. Respondent determined such amounts were includable under the applicable Florida statute and issued a Notice of Proposed Assessment.

Petitioner acknowledged the amounts were includable under the applicable Florida statute, but protested such determination on the grounds inclusion of foreign source income in state income violated the Foreign Commerce Clause of the U.S. Constitution. On December 18, 1998, Respondent issued a Notice of Decision sustaining the proposed assessment. App. p.10. Because there are no disputed facts, Petitioner did not request review pursuant to the administrative procedures or by the Circuit Court, which is Florida's court of first instance. On January 14, 1999, Petitioner appealed directly to the District Court of Appeals, State of Florida, Fourth District ("District Court"), as permitted by section 120.68 of the Florida Statutes.

In the District Court, Petitioner asserted that Florida's inclusion of foreign subsidiary income in Petitioner's appor-

tionable tax base violated the Foreign Commerce Clause of the U.S. Constitution. The District Court issued its opinion on August 16, 2000. Petitioner filed a timely Motion for Rehearing, which the district court denied by Order entered November 9, 2000. Petitioner requested the Supreme Court of Florida exercise its discretion to review the Decision of the District Court. The request was denied by Order issued May 30, 2001.

Because the case was submitted directly to the District Court, there is no trial record or findings of fact. The only facts relevant to this Petition are set forth in the opening paragraphs; to wit: under the applicable Florida Statute, a portion of the income of Petitioner's foreign subsidiary was included in its Florida apportionable tax base but the factors of Petitioner's foreign subsidiary were not included in its Florida apportionment formula. The issue is whether such statutory scheme is valid.

ARGUMENT

The Supreme Court should review the District Court's decision because the District Court decided an important question of federal law in a way that conflicts with decisions of this Court and decisions of other states' courts of last resort. In addition, the Court should resolve the issue opened by a footnote ("Footnote 23") to its opinion in *Kraft,* 505 U.S. at 80, n. 23.

In *Kraft*, the Court held that the flow of value between a parent company and its foreign subsidiaries engaged in a unitary business constitutes foreign commerce; that such flow includes foreign subsidiary dividends; and that Iowa's statutory scheme which allowed a deduction for dividends received from domestic subsidiaries, but not for dividends received from foreign subsidiaries, was invalid because it

facially discriminated against foreign commerce. In conformity with the *Kraft* rationale, several states' courts of last resort have held invalid similar statutory schemes. *Conoco, Inc. and Intel Corporation v. Taxation and Revenue Department of the State of New Mexico*, 931 P.2d 730 (N.M. 1996); *Emerson Electric Company and Subsidiaries v. Tracy, Tax Commissioner*, 735 N.E. 2d 445 (Ohio 2000); *Dart Industries v. R. Gary Clark, Tax Administrator*, 657 A.2d 1062 (R.I. 1995).

In the instant case, Petitioner elected the consolidated method of determining apportionable net income. Under Florida's statutory scheme, Petitioner's apportionable taxable income included the business income of its domestic subsidiaries, and part of the business income of its foreign subsidiary. However, only the factors of the domestic subsidiaries were included in the apportionment formula. Essentially, Florida's statute treated the foreign subsidiary amount as a taxable dividend and not part of the apportionable business income. This taxation scheme is identical to schemes commonly known as the "domestic combination" or "water's edge" methods of determining apportionable income. It is indisputable that this method, as applied in Florida, treated dividend-equivalents from foreign subsidiaries less favorably than profits from domestic subsidiaries. *Cf. Kraft*, 505 U.S. at 75.

In the instant case, the District Court opined that the consolidated method ultimately subjected all Petitioner's income, including dividends received from foreign subsidiaries, in one form or another to Florida's corporate tax. The District Court concluded that the deemed dividends from a foreign subsidiary were not treated less favorably than dividends from a domestic subsidiary because business income of a foreign subsidiary was treated more favorably than business income of a domestic subsidiary. Essentially, the Dis-

trict Court decided that taxing foreign subsidiary dividends is not discriminatory in a consolidated reporting regime because the exclusion of foreign business income compensates for the inclusion of foreign dividends.

Prior to discussing the relevance of Footnote 23, and contrary to the District Court's inherent and incorrect assumption, inclusion of foreign subsidiary dividends but not foreign subsidiary business income is not equivalent to inclusion of domestic subsidiary business income but not domestic subsidiary dividends if the denominator of the apportionment fraction includes the factors of the domestic subsidiary but not the factors of the foreign subsidiary. In the case of domestic subsidiary profits, but not in the case of foreign subsidiary profits, the amount taxable by the state is decreased by including factors of the domestic subsidiary in the denominator which result in apportioning business income generated in other jurisdictions to the other jurisdictions. [2]

Clearly, domestic combination reporting does not cure the discrimination invalidated by *Kraft*. Instead, it apportions a foreign subsidiary's profits among domestic members of the consolidated group. Taxation of foreign subsidiary profits without foreign subsidiary factor representation results in the state taxing business income generated in a foreign jurisdiction. This foreign source income would not be subject to state tax if apportioned by inclusion of the foreign subsidiary's factors in the apportionment fraction, in the same manner as business profits of a domestic subsidiary are

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[2] The Florida Statute relating to taxing Foreign Sales Corporation dividends was amended, effective after January 1, 1993, to exclude such dividends from its apportionable income base. This amendment does not address the issue of federal importance, i.e. whether foreign subsidiary income may be included in apportionable income without including the factors that produce such income in the apportionment fraction.

apportioned by inclusion of a domestic subsidiary's factors in the apportionment fraction. [3]

The inclusion of foreign subsidiary profits without factor representation violates this Court's rulings in *Kraft* and other cases involving states' taxation of foreign source income. *see Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977) (a state cannot impose tax on income generated by activities not within the state, which it does if any part of foreign subsidiary profits are included without factor representation); *see also, Barclays Bank PLC v. Franchise Tax Board of California*, 512 U.S. 298 (1994) (a state may include worldwide income in its apportionable income base, but only if it also includes the factors of the foreign corporations that generated such income in the denominator of the apportionment fraction); *see also, Container Corporation of America v. Franchise Tax Board of California*, 463 U.S. 159 (1983) (sets forth the internal consistency requirements that a state's apportionment formula must be such that, if applied in every jurisdiction, it would result in no more than all business income being taxed once). In the instant case, Florida's statutory scheme violated this Court's rulings because if the tax statutes of the foreign jurisdiction were the same as Flor-

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[3] Jerome Hellerstein, State Taxation at ¶ 4.20(1), 4-193 ("the inclusion of the foreign source income without providing for representation of the factors that produce such income in the apportionment formula clearly treats foreign source income less favorably than it treats domestic source income [whose factors are included in the combined report]. Merely because such discrimination may be more difficult to discern than the discrimination the court invalidated in *Kraft* is no justification for tolerating it."). *See also*, Sarah H. Beard, "Are Foreign Dividends Taxable in Combined Reporting States, Despite *Kraft*?" 5 Journal of Multistate Taxation, 256; *see also*, Michael W. McLaughlin, "Is Water's Edge Combination Constitutional without Factor Representation?" 98 STN 128-19.

ida's, the profits of the foreign subsidiary would have been taxed in Florida and in the foreign jurisdiction.

Although not cited, the District Court's decision mirrored the Kansas Supreme Court's decision in *Appeal of Morton Thiokol, Inc.*, 864 P.2d 1175 (Kan. 1993). In *Morton Thiokol*, the Kansas Court held the inclusion of foreign subsidiary dividends in the apportionable income base did not violate the *Kraft* rule because Kansas used the domestic combination method which excludes the business income of a foreign subsidiary. *Id.* In the instant case, the Florida District Court held the inclusion of foreign subsidiary dividend equivalents in the apportionable income base did not violate the *Kraft* rule because Florida permitted use of a consolidated method which excludes the business income of a foreign subsidiary. Although the Florida District Court did not support its reasoning further, the Kansas Court relied on dicta in Footnote 23 of the *Kraft* opinion; to wit:

> If one were to compare the aggregate tax imposed by [a state] on a unitary business which included a subsidiary doing business throughout the United States (including [the state]) with the aggregate tax imposed by [the state] on a unitary business which included a foreign subsidiary doing business abroad, it would be difficult to say that [the state] discriminates against the business with the foreign subsidiary. [The state] would tax an apportioned share of the domestic subsidiary's entire earnings, but would tax only the amount of the foreign subsidiary's earnings paid as a dividend to the parent.
>
> In considering claims of discriminatory taxation under the Commerce Clause, however, it

> is necessary to compare the taxpayers who are "most similarly situated." *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 71, 83 S.Ct. 1201, 1205, (1963). In the former case, the [in state] operations of the subsidiary provide an independent basis for taxation not present in the case of the foreign subsidiary. A more appropriate comparison is between corporations whose subsidiaries do not do business in [that state].

Morton Thiokol, 864 P.2d at 1184, *citing, Kraft*, 505 U.S. at 80, fn. 23.

The Kansas Court then reasoned:

> The [Kraft opinion] contains the strong, unqualified statement that [the state at bar] burdens foreign subsidiaries more than domestic ones. . . Footnote [23] contains a qualification [,w]ithout [which],. . ., the statement would not have been unequivocally accurate. The footnote states that the burden will not always be unequal. The first paragraph sketches circumstances in which there would be no inequality; the second paragraph explains why the discriminatory circumstances are the ones on which the Court based its ruling.

Morton Thiokol, 864 P.2d at 1135.

The Kansas Court relied on Footnote 23 to conclude the burden imposed on foreign subsidiary dividends was not unequal because under the domestic combination reporting method, the business income (but not dividends) of domestic

subsidiaries were combined, apportioned and taxed and only the dividends (but not business income) of foreign subsidiaries were combined and taxed. The Kansas and Florida courts failed to recognize the obvious omission that results in discrimination: failure to apportion the dividends of foreign subsidiaries. Because of factor representation, no part of the domestic subsidiaries' business income that is apportionable to other jurisdictions is subject to tax by the state, in addition no dividends from such subsidiaries are subject to tax. Conversely, while no part of the foreign subsidiaries' business income is subject to tax by the state, dividends or, in the case of Florida, a portion of the business profits from such subsidiaries are. This is discrimination. The tax on foreign source income is not offset by there being no tax on some of the foreign subsidiary business income earned outside a state, because there is no tax on all of the domestic subsidiary business income earned outside a state.

Although the intended application of Footnote 23 is unclear, it is clear that, under the domestic combination method, the business income of domestic subsidiaries is combined, apportioned, and taxed but the business income of foreign subsidiaries taxed as dividends simply is combined (i.e., added to the income of domestic members of the group) and taxed. If the apportionment formula works, which is an assumption that justifies use, the business profits generated by both domestic and foreign subsidiaries outside the taxing state will not be subject to tax only if the factors of both are included in the denominator of the apportionment fraction. Inclusion of foreign subsidiary amounts without inclusion of the foreign subsidiary factors in the apportionment fraction results in the taxation of income generated in foreign jurisdictions.

The decision of the District Court is based on the holding that combined reporting cures the discrimination in-

herit in including foreign source profits in the apportionable tax base. It does not. The holding of the District Court is erroneous. Moreover, Footnote 23 of *Kraft* is misleading, and distinctions based on its construction have denigrated this Court's ruling and to permitted discriminatory taxation of foreign subsidiary items that would not be taxable if paid by a domestic subsidiary. For example, in *Caterpillar, Inc. v. Commissioner of Internal Revenue*, 568 N.W. 2d 695 (Minn. 1997), *cert. den.* 522 U.S. 1112, the Minnesota Supreme Court relied on Footnote 23 as support for the proposition that taxing interest and royalties paid to domestic members from foreign subsidiaries is not discriminatory, even though such items are nontaxable if paid from domestic subsidiaries because the entire income of domestic members, but not foreign members, is subject to tax under its water's edge combined reporting method. *See also, Caterpillar Financial Services Corporation v. Douglas Whitley, as Director of the Illinois Department of Revenue*, 680 N.E. 2d 1082 (Ill. 1997) (on the basis of Footnote 23, the *Kraft* rule is not applicable if the domestic combination method of reporting is utilized).

A state's inclusion of profits from a foreign subsidiary that is part of a unitary business in its tax base without inclusion of the factors of that foreign subsidiary in the denominator of the apportionment fraction, will result in state taxation of the flow of foreign commerce, contrary to controlling federal policy. The Court should clarify Footnote 23 and the applicable rule of law.

CONCLUSION

For the foregoing reasons, the Court should issue a Writ of Certiorari with respect to this case.

Respectfully submitted,

Robert O. Rogers
Petitioner's Counsel of Record

APPENDIX

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT JULY TERM 2000

BERNARD EGAN COMPANY AND SUBSIDIARIES,

Appellant,

v.

STATE OF FLORIDA DEPARTMENT OF REVENUE,

Appellee.

CASE NO. 4D99-0233

Opinion filed August 16, 2000

Appeal from the State of Florida, Department of Revenue; L.T. Case No. 9800976.

Robert O. Rogers, Allison B. Rogers and Richard Paladino of Rogers, Bowers, Dempsey and Paladino, West Palm Beach, for appellant.

Robert A. Butterworth, Attorney General, and Jeffrey M. Dikman, Assistant Attorney General, Tallahassee, for appellee.

STEVENSON, J.

Appellant, Bernard Egan & Company and Subsidiaries ("Egan"), is a citrus company incorporated in the State of Florida. Egan sells produce throughout the United States through wholly-owned domestic subsidiaries and sells produce in foreign countries through DNE Sales International, Inc., a foreign subsidiary incorporated in the Virgin Islands. Egan appeals a final order of the Florida Department of Revenue assessing a tax deficiency of $362,069.10 and disallowing the exclusion of dividend income from its foreign subsidiary, DNE, in calculating Egan's Florida corporate tax base. We affirm.

Corporate taxable income in Florida is derived by determining the corporation's adjusted federal income and making certain statutory adjustments. *See* §§220.12, .13, Fla. Stat. (1997). Pursuant to the Internal Revenue Code, a corporation calculates its federal taxable income by **excluding** dividends received by the parent company from its **domestic subsidiaries** but **including** dividends form its **foreign subsidiaries**. *See* 26 U.S.C.A. §243 (1988 & West Supp. 2000). Egan argues that the statutory provision in effect during the relevant taxing periods, section 220.13(1)(b)2.b., Florida Statutes (1991), violates the foreign Commerce Clause[1] because the statute, by "piggybacking" on the federal tax code, treats domestic subsidiaries more favorably than foreign subsidiaries.[2]

The United States Supreme Court has stated that [T]he Foreign Commerce Clause recognizes that discriminatory

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[1] "The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes[.]" U.S.CONST.art. I, § 8, cl.3.

[2] For tax years beginning on or after January 1, 1993, section 220.13(1)(b)2.b. was amended to allow a subtraction of both foreign and domestic dividends from adjusted federal income for Florida income tax purposes.

treatment of foreign commerce may create problems, such as the potential for international retaliation, that concern the Nation as a whole. . . . [A] State's preference for domestic commerce over foreign commerce is inconsistent with the Commerce Clause . . . . *Kraft Gen. Foods, Inc. v. Iowa Dep't of Revenue & Fin.* 505 U.S. 71, 79 (1992)(citation omitted). In this case, we agree with the Department of Revenue that no violation of the Foreign Commerce Clause has occurred since, under the Florida Income Tax Code and the consolidated reporting methods employed by Egan, all of its domestic income (including dividends) was, in one form or another, included in its corporate tax base and ultimately subject to Florida corporate tax - just as were the dividends received from its foreign subsidiary. Therefore, under the statute, the dividends from Egan's foreign subsidiary were not given less favorable treatment than the dividends received from its domestic subsidiaries.

Accordingly, we distinguish this case from *Kraft General Foods, Inc. v. Iowa Department of Revenue & Finance*, 505 US 71 (1992), where the United States Supreme Court held that Iowa's taxing scheme was discriminatory because, in using the federal definition of taxable income, Iowa treated dividends from foreign subsidiaries less favorably than dividends from domestic subsidiaries since foreign subsidiary dividends were include din the taxpayer's tax base, but domestic subsidiary dividends were not. Significantly, in *Kraft*, the court noted that Iowa could utilize the federal definition of taxable income as long as it made "adjustments that avoid the discriminatory treatment of foreign subsidiary dividends.

Since the statute is non-discriminatory as applied to the facts of this case, Egan has failed to meet is heavy burden of demonstrating that the statute is unconstitutional. *See State v. Stalder*, 630 So.2d 1072 (Fla. 1994); *Bunnell v. State*, 453

So.2d 808 (Fla. 1984). We, therefore, find the statute constitutional as applied to Egan and affirm the deficiency assessed.[3]

AFFIRMED.

GROSS, J., and BAILEY, JENNIFER D., Associate Judge, concur.

NOT FINAL UNTIL THE DISPOSITION OF ANY TIMELY FILED MOTION FOR REHEARING.

[3] We have considered, but rejected appellant's equal protection argument.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT, P.O. BOX 3315, WEST PALM BEACH, FL 33402

November 9, 2000

CASE NO.: 4D99-233
L.T. No.:948312012-020

Bernard Egan & Company And Subsidiaries	v.	State of Florida Dept. of Revenue
Appellant/Petitioner(s),		Appellee/Respondent(s).

BY ORDER OF THE COURT:

ORDERED that appellant's motion filed August 31, 2000, for rehearing is hereby denied.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

Served:

Robert Owen Rogers Allison B. Rogers Jeffrey M. Dikman

Ch

/s/

MARILYN BEUTTENMULLER, Clerk
Fourth District Court of Appeal

M A N D A T E

From

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT

This cause having been brought to the Court by appeal, and after due consideration the Court having issued its opinion;

YOU ARE HEREBY COMMANDED that such further proceedings be had in said cause as may be in accordance with the opinion of this Court, and with the rules of procedure and laws of the State of Florida.

WITNESS the Honorable MARTHA C. WARNER, Chief Judge of the District Court of Appeal of the State of Florida, Fourth District, and seal of the said Court of West Palm Beach, Florida on this day.

DATE:	December 1, 2000
CASE NO:	4D99-233
COUNTY OF ORIGIN:	Palm Beach
T.C. CASE NO.:	9408312012-020, 9800976
STYLE:	BERNARD EGAN & COMPANY AND SUBSIDIARIES v. STATE OF FLORIDA DEPT. OF REVENUE

/s/

MARILYN BEUTTENMULLER,
Clerk, Fourth District Court of Appeal

ORIGINAL TO: Department of Revenue

cc:

Robert Owen Rogers Richard Paladino Allison B. Rogers
Jeffrey M. Dikman Attorney General-Tallahassee

Al

SUPREME COURT OF FLORIDA

WEDNESDAY, MAY 30, 2001

CASE NO.: SC00-2533
Lower Tribunal No.: 4D99-0233

BERNARD EGAN & COMPANY AND SUBSIDIARIES	vs. FLORIDA DEPARTMENT OF REVENUE
Petitioner(s)	Respondent(s)

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P.9.330(d).

WELLS,C.J., and SHAW, HARDING, LEWIS and QUINCE, JJ., concur.

A True Copy
Test:

/s/

Thomas D. Hall
Clerk, Supreme Court

bh

Served:

ALLISON B. ROGERS
RICHARD PALADINO
ROBERT O. ROGERS
JEFFREY M. DICKMAN
HON. MARILYN BEUTTENMULLER, CLERK

STATE OF FLORIDA
DEPARTMENT OF REVENUE
TALLAHASSEE, FLORIDA 32399-0100

Ms. Allison B. Rogers
Rogers, Bowers, Dempsey and Paladino
505 South Flagler drive, Suite 1330
West Palm Beach, FL 33401

Re: Notice of Decision
Bernard Egan & Company and Subsidiaries
("Taxpayer")
FEI #22-1730999
DTA No. 9800976
Source No. 9408312012-020
Corporate Income Tax
Periods: 07/01/90 through 06/30/95

Proposed Assessment Amount:		$345,849.32
Sustained Amount:		$345,849.12
Balance Due:	*	$345,069.10

* Includes interest $61.91 per day from March 30, 1998 through December 18, 1998.

Dear Ms. Rogers:

This is the Department's response to the revised protest letter dated August 10, 1998, filed against the referenced assessment. The original and revised letter of protest, the case file, and other available information have been carefully reviewed. This reply constitutes the issuance of our Notice of Decision, pursuant to the provisions of Rule 12-6.003,

F.A.C. It represents our position based on applicable law to the issues under protect.

ISSUES

Whether Taxpayer is entitled to an exclusion from adjusted federal income (for purposes of determining its Florida net taxable income) for distributions from Taxpayer's Foreign Sales Corporation (FSC").

Whether Taxpayer is entitled to an exclusion from adjusted federal income (for purposes of determining its Florida net taxable income) for deemed distributions from Taxpayer's former Domestic International Sales Corporation ("DISC").

FACTS AS PRESENTED BY TAXPAYER

Bernard Egan and Company (referred herein as "Taxpayer") is a Florida corporation, actively engaged in the business of growing and selling Florida citrus. Taxpayer is the parent of an affiliated group of corporations, and for the tax years at issue, filed consolidated Florida corporate income tax returns. Taxpayer conducts business in other states and foreign countries through wholly owned subsidiaries. During the years at issue, Taxpayer made its international sales of citrus through DNE Sales International (V.I.), Inc. (hereinafter referred to as "DNE"), a Virgin Islands corporation. DNE qualified as a FSC pursuant to IRC §§921 through 927, and as a Controlled Foreign Corporation pursuant to IRC §957. DNE's sole business activity was the sale of citrus produced in the United States by its parent (and/or parent's other subsidiaries) for oversees consumption. DNE calculated its foreign trade income under the transfer pricing rules. Taxpayer filed consolidated Florida income tax returns for all of the years at issue, and calculated its Florida corporate income tax base by adjusting its federal

taxable income (which included the distributions from DNE and deemed distributions from Taxpayer's former DISC) by the allowable Florida additions and subtractions. Then, notwithstanding contrary provisions of Florida law, Taxpayer also subtracted all of the distributions from DNE and the deemed distributions from Taxpayer's former FISC in calculating Taxpayer's Florida taxable income. Upon audit, these subtractions were disallowed, which Taxpayer has protested.

TAXPAYER'S ARGUMENT

Taxpayer has not filed a Protest with respect to the tax year ended June 30, 1995. For the remaining four tax years (July 1, 1990 through June 30, 1994), Taxpayer contends that Florida's failure to allow a full deduction for distributions and deemed distributions received by Taxpayer from its wholly owned FSC and former DISC is unconstitutional. Taxpayer cited *Kraft Gen. Foods, Inc. v. Iowa Dept. of Revenue,* 505 U.S. 71 (1992), in support of this proposition.

Applicable law

Section 220.12(1),F.S., as in effect during the tax years July 1, 1990 through June 30, 1993, provided in pertinent part:

> (1) The term "adjusted federal income" means an amount equal to the taxpayer's taxable income as defined in subsection (2), or such taxable income of more than one taxpayer as provided in s.220.131, for the taxable year, adjusted as follows:
> ***
> (b) Subtractions.
> ***

2. There shall be subtracted from such taxable income any amount to the extent included therein the following:

a. Dividends treated as received from sources without the United States, as determined under s. 862 of the Internal Revenue Code.
b. All amounts included in taxable income under s. 78 of the Internal Revenue Code.

However, as to any amount subtracted under this subparagraph, there shall be added to such taxable income all expenses deducted on the taxpayer's return for the taxable year which are attributable, directly or indirectly, to such subcontracted amount. Further, no amount shall be subtracted with respect to dividends paid or deemed paid by a Domestic International Sales Corporation.

Rule 12C-1.013(10), F.A.C., as currently in effect, states:

(a) There will be subtracted from taxable income, to the extent included therein, the amounts provided in paragraphs (b), (c), and (d) of this subsection. However, as to any amounts subtracted under this paragraph, such amount will be reduced by all expenses deducted on the taxpayer's return for the taxable year which are attributable, directly or indirectly, to such subtracted amount. Further, no amount will be subtracted from federal taxable income with respect to dividends paid or deemed paid by a Domestic International Sales Corporation.
(b) A subtraction for subpart F income, included for federal tax purposes under s. 951, I.R.C., is not allowed for taxable years beginning before January 1, 1993. For taxable years beginning on or after

January 1, 1993, a subtraction from adjusted federal income is provided for subpart F income reported under s. 951, I.R.C., net of associated expenses. To support the amount of subpart F income claimed, all federal forms, schedules and worksheets associated with I.R.S. Form 5471 must be attached to the Form F-1120.

(c) Dividends treated as received from sources without the United States, as determined under s. 862 of the Internal Revenue Code.

(d) All amounts included in taxable income under s. 78 of the Internal Revenue Code.

DISCUSSION AND ANALYSIS

Taxpayer sole challenge is to the constitutionality of §220.13(1)(b)2, F.S. Taxpayer contends that §220.13(1)(b)2, F.S. is unconstitutional because, during the tax years at issue, it did not provide for a deduction from Florida net taxable income for distributions and deemed distributions from Taxpayer's FSC and former DISC. Taxpayer has characterized this income as Subpart F income, that is, generally speaking, income from foreign sources. With certain exceptions, distributions and deemed distributions from Taxpayer's FSC and former DISC are taxable to the Taxpayer for federal income tax purposes. However, as with dividends from domestic subsidiaries, taxpayers are allowed a dividends-received deduction for distributions received by the parent from its FSC. IRC §§245(c)(1)(A) and 243. For the years in issue, Florida followed the federal corporate income tax law, and allowed a dividends-received deduction for both foreign and domestic dividends (the dividends-received deduction is taken on the federal income tax return, prior to reaching adjusted federal income - which is the starting point for calculating Florida taxable income). For tax years beginning on or after January

1, 1993, §220.13(1)(b)2b, F.S., was amended to allow a subtraction of all IRC §951 income, from adjusted federal income.

The Department of Revenue is an executive agency, operating under the direction of the Governor and the Cabinet. One of its functions is the administration and interpretation of the tax statutes, as enacted by the Legislature. §213.01, F.S. Though not controlling, the administrative construction of a statute by those charged with its enforcement and interpretation is entitled to great weight, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized. *Department of Revenue v. First Union National Bank of Florida,* 513 So.2d 114, 117 (1987). Taxpayer has challenged §220.13(1)(b)2, F.S. on direct constitutional grounds, citing *Kraft Gen. Food, Inc. v. Iowa Dept. of Revenue, supra,* as authority. The Department does not make policy, nor does it have the power to determine the constitutionality of a tax statute. A determination of the constitutionality of §220.13(1)(b)2, F.S., is solely within the province of the judiciary. Generally speaking, an executive agency is limited to administering and interpreting the laws enacted by the legislative branch. In this case, there is no ambiguity in the statute requiring interpretation and neither the federal courts nor the Florida courts have decided the constitutionality of §220.13(1)(b)2, F.S. The Provisions of §220.13(1)(b)2, F.S. are directly applicable to Taxpayer's case, and for this reason, the proposed assessment is sustained in full.

Assuming *Arguendo* that §220.12(1)(b)2, F.S., was subject to constitutional challenge as a result of *Kraft*, Taxpayer still would not prevail. Before reaching the issue of constitutionality, a court will consider at least three other issues. First, whether *Kraft* applies to §213.13(1)(b)2, F.S.,

in the context of monies received from FSCs. Second, whether *Kraft* applies to §213.13(1)(b)2, F.S., in the context of monies received from DISCs. Third, in the event that *Kraft* does apply, whether Taxpayer is required to offset expenses incurred in generating exempt income, and to adjust apportionment factors.

In *Kraft Gen. Foods, Inc. v. Iowa Dept. of Revenue,* 505 U.S. 71 (1992), the U.S. Supreme Court ruled that Iowa's tax treatment of dividends received by a domestic parent corporation from foreign subsidiaries unconstitutionally discriminated against foreign commerce on violation of the Foreign Commerce Clause. The taxing scheme before the Court in *Kraft* resembled the one used in Florida and thirty-nine other states in one respect: Iowa used the federal tax system's calculation of corporate income as its starting point for determining a corporation's apprortionable income. *Kraft, at page 74.* However, unlike Florida, Iowa's taxing scheme did not allow a dividends-received deduction for dividends received from foreign subsidiaries. IRC §§243 and 245(c)(1)(A) (the dividends-received deduction). Although parent corporations can generally deduct dividends paid by foreign subsidiaries from their gross income, the federal formula also permits a tax credit for foreign income taxes paid by the subsidiary on the income from which the dividends were paid, and for the foreign taxes withheld from the dividends, to mitigate the consequences of international double taxation. IRC §78. For certain tax reasons, most taxpayers choose to claim the credit against foreign taxes paid, rather than the dividends-received deduction. IRC §§27 and 164. The Iowa tax scheme went beyond most states in that Iowa included a foreign subsidiary's dividends in a corporation's gross income and permitted neither a corresponding deduction or tax credit for foreign taxes paid. *Kraft, at page 76.* Based on this taxing scheme, the U.S. Supreme Court determined that "the only subsidiary dividend

payments taxed by Iowa are those reflecting the foreign business activity of foreign subsidiaries," and that the Iowa tax scheme violated the Foreign Commerce Clause. *Kraft at page 77.*

Since then, the highest court of at least five states have addressed the applicability of *Kraft* to their taxing schemes, and have reached different conclusions. *Caterpillar, inc. v. C.I.R.*, 568 N.W. 2d 695 (Minn. 1997); *Conoco, Inc. v. Revenue Dept.* 931 P.2d 730 (N.M. 1996), cert den. 117 S.Ct. 2497 (1997); *DuPont De Nemours v. State Tax Assessor,* 675 A.2nd 82 (Me. 1996); *Dart Industries, Inc. v. Clark,* 657 A.2d 1062 (R.I. 1995); *Appeal of Morton Thiokol,* 864 P.2d1175 (Kan. 1993). The taxing schemes of Minnesota, Maine, and Kansas were held to be constitutional by their state supreme courts, while the taxing schemes of Rhode Island and New Mexico were held to violate the Foreign Commerce Clause in light of the *Kraft* decision. At least three of these state supreme courts have held that *Kraft* does not apply to a combined entity reporting system. *Dupont,* at 87; *Conoco,* at 735; *Morton Thiokol,* at 1186. Neither *Kraft* nor the five state supreme court decisions addressed the application of *Kraft* to FSCs or former DISCs. Furthermore, the taxpayers in those cases had either been denied a dividends-received deduction (*Kraft*) for distributions from their foreign subsidiaries, or more commonly, had paid foreign taxes, for which a foreign tax credit was not permitted. The fatal flaw in Iowa's taxing scheme was not that it taxed foreign dividends, rather, the flaw was that Iowa differentiated between dividends received from foreign subsidiaries and domestic subsidiaries by not allowing a dividends-received deduction for a tax credit for foreign taxes paid.

Unlike Iowa, Florida allows a consolidated reporting method, in addition to a single reporting system, and permits

a deduction for foreign dividends received. Taxpayer's income from its FSC and former DISC was taxable for federal tax purposes in the same way that it was taxable for Florida corporate income tax purposes. Also, there are two other significant differences, which are discussed in the following paragraphs. First, Taxpayer neither incurred nor paid any foreign taxes, and accordingly, was not entitled to a foreign tax credit during any of the years in issue. This fact is confirmed by both the Taxpayer's representative and the federal income tax returns (Schedule J) filed by the Taxpayer. Second, FSCs and DISCs are specially created tax entities, with certain tax benefits and burdens. Taxpayer elected to form a FSC and former DISC, and received both the tax benefits and burdens of those entities. One of the tax benefits Taxpayer received as a 30% off-the-top exclusion of the gross income earned by its wholly owned FSC. This tax benefit is not available to non-FSC foreign subsidiaries.

During the tax years at issue, Taxpayer sold citrus overseas through its wholly owned FSC, which was incorporated in 1984 in the U.S. Virgin Islands. All of Taxpayer's overseas sales were made through its wholly owned FSC. There are significant organization differences and tax attributes between a FSC and the foreign subsidiaries at issue in *Kraft* and the cases following *Kraft*. In general, FSCs are foreign corporations, organized in countries or U.S. Possessions, which sell U.S. goods abroad. As with the DISCs, the Congressional intent behind the FSC provisions was to create a federal tax incentive for exports of goods produced in the United States. FSCs have a special tax regime, created in 1984, contained in IRS §921-927 and 291(a)(4), *Gustafson, Taxation of International Transactions* ¶11,130 (1987). If a corporation qualifies for and elects FSC status, the federal tax benefit accorded the FSC is an exemption of a portion of its export-related income from the U.S. corporate income tax. This portion, moreover, can be distributed as a

tax-free dividend to the U.S. parent corporation of the FSC since the distribution qualifies for a 100-percent dividends-received deduction. IRC §245(c)(1)(A) (other than IRC §923(a)(2) non-exempt income). Because the benefit of the U.S. tax exemption for a FSC's export-related income is reduced to the extent of any foreign taxes imposed on that income, U.S. enterprises normally organize FSCs in foreign countries or possessions imposing relatively low or no corporate and dividend withholding taxes on that income.

Unlike foreign corporations or subsidiaries, FSCs are generally not allowed a foreign tax credit for foreign income taxes paid or accrued with respect to exempt or non-exempt foreign trade income (other than IRC §923(a)(2) non-exempt income). IRC §906(b)(5). In addition, a shareholder of a FSC generally will not be eligible for a foreign tax credit with respect to a foreign withholding tax imposed on a dividend attributable to foreign trade income. In fact, the Taxpayer in this case neither incurred nor paid foreign taxes during any of the tax years at issue, and accordingly, was not entitled to a foreign tax credit. Also, a FSC must waive any benefits under an otherwise applicable tax treaty. IRC §927(e)(4). The long and the short of it is that an income earned and distributed by a FSC is afforded special tax treatment not available to domestic or foreign subsidiaries. A FSC is a unique tax entity, and cannot be compared to a foreign or domestic subsidiary. For example, a FSC may elect to be taxed under the Administrative Pricing Rules of IRC §925 or the Transfer Pricing Rules of IRC §482. If the Transfer Pricing Rules are used, 30% of the FSC's gross foreign trade income (exclusive of income attributable to manufacturing and marketing intangibles) is exempt foreign trade income. IRC §§923(a)(2) and 291(a)(4)(A). If the FSC is a controlled foreign corporation selling goods acquired from its related U.S. parent, its income would be foreign base company sales income. The ultimate result of

FSC election for a U.S. corporate shareholder (and the Taxpayer in this case) is that exempt foreign trade income is subject to no U.S. tax, and non-exempt foreign trade income is only subject to a single level of U.S. corporate tax at the FSC level. *See also Kraft, Inc. v. Sweet,* 572 N.E. 2d 389 (4th Ill. App. 1991), app. Denied, 580 N.E. 2d 117 (Ill. 1991) (income from a Controlled Foreign Corporation is not a dividend for Subpart F purposes).

In this case, Taxpayer measured the benefits and burdens of operating as a FSC, and chose that form of its business. In *Naporano v. United States,* 834 F. Supp. 694 (D. N.J. 1993), the court held that S corporations were not "domestic corporations" within the meaning of IRC §245(c)(1)(A) and, therefore, S corporation shareholders were not entitled to a dividends-received deduction for dividends received from a FSC.

At bottom, there are two reasons why Taxpayer's election as a FSC is important to this case. First, Taxpayer's FSC election is no different than a decision to operate as a partnership or as an S corporation. Like an S corporation, a FSC files an election to be treated as a FSC (Form 8279), the number of shareholders is limited, and the FSC reports its income on a special federal income tax return (Form 1120-FSC). In this case, one of the tax benefits received by Taxpayer was an exclusion of 30% of its gross foreign trade income from federal and state corporate income tax. Taxpayer chose to do business as a FSC, and thereby accepted the benefits and burdens of that particular organizational form of business. Having made an FSC election, Taxpayer is bound by the tax consequences under both state and federal law. Like Congress, the Florida Legislature may choose to treat FSCs differently from other entities, just as partnerships, limited liability companies, S corporations, and trusts are treated differently. Second, as a

FSC, Taxpayer is not entitled to claim a foreign tax credit, and under a *Kraft* analysis is treated identically to a domestic corporation. Taxpayer notes that it elected to be taxed under the transfer pricing rules of IRC §482, and claims that it is entitled to receive an adjustment for foreign taxes paid. But Taxpayer neither incurred nor paid any foreign taxes, and is not, in fact, entitled to claim a foreign tax credit. As previously discussed, Taxpayer filed an election to be treated as a FSC, primarily because of the tax benefits afforded a FSC.

The second question a court may consider is whether *Kraft* applies to §220.13(1)(b)2, F.S., in the context of deemed distributions received from a former DISC. In the typical case, a DISC is a wholly owned U.S. subsidiary of a U.S. corporation, with the result that distributions and deemed distributions from DISCs are typically subject to corporate tax and, eventually (on the federal level), to shareholder-level tax when distributed to individuals. The flush language of §220.13(1)(b)2, F.S., specifically requires the inclusion of DISC dividends in income, and remains unchanged to the present:

> "*** Further, no amount shall be subtracted with respect to dividends paid or deemed paid by a Domestic International Sales Corporation.

This provision is similar to the language of IRC §246(d), which provides:

> No deduction shall be allowed under section 243 in respect of a dividend from a corporation which is a DISC or former DISC (as defined in section 992(a)) to the extent such dividend is paid out of the corporation's accumulated DISC income or previously taxed income, or is a deemed distribution pursuant to section 995(b)(1).

Taxpayer has-claimed a deduction for deemed distributions from a former DISC for the tax years July 1, 1990 through June 30, 1994. The long and the short of it is that neither the Internal Revenue Code or the Florida Income Tax Code allow a deduction for distributions from DISCs. In light of the specific language of §220.13(1)(b)2, F.S., the deduction is disallowed, and the assessment sustained with respect to this issue. Further, as discussed above, Taxpayer has chosen the unique tax benefits available through DISC. Having made that choice, Taxpayer is bound by the tax consequences of its choice of business form.

Third, a court may consider whether Taxpayer is required to match expenses attributable to the subtracted income on the Taxpayer's return for the taxable year. Case law and the specific language of §220.13(1)(b)2, F. S., provide for an offset of the expenses attributable to income subtracted under this section. The flush language of this section provides in pertinent part:

> However, as to any amount subtracted under this subparagraph, there shall be added to such taxable income all expense deducted on the taxpayer's return for the taxable year which are attributable, directly or indirectly, to such subtracted amount.***

If an item of income is exempted or otherwise excluded from taxation, it is only logical that the expenses which give rise to that item of income are similarly excluded from the tax formula. *Associated Coca-Cola Bottling Co., Inc. v. Department of Revenue, State of Florida* (DOAH 80-221OR), 3 FALR 705-A (1981); §220.13(1)(b)6, F.S. Therefore, although income from Taxpayer's FSCs and DISCs is fully taxable (and not subtracted from income pursuant to §220.13(1)(b)2, F.S., any such subtraction would necessarily require an offset of expenses attributable to such

subtracted amount. Taxpayer's apportionment factors would similarly be adjusted, to the extent necessary to remove the affect of exempt income. §220.13(1)(b) 6, F.S. Taxpayer did not offset the expenses attributable to the FSC and DISC amounts that Taxpayer subtracted on its amended returns.

CONCLUSION

The power to determine the constitutionality of §220.13(1)(b)2, F.S., resides within the judicial branch. The Department of Revenue is charged with the administration of the revenue laws of the state as enacted by the legislature, and interpreted by the courts. No court has determined the constitutionality of §220.13(1)(b)2, F.S., and there is no ambiguity in the language of the statute requiring interpretation. For these reasons, the assessment is sustained in its entirety. Enclosed for your convenience is a Computation of Total Liability. Payment should be returned in the enclosed envelope. The check should reflect the tax type and source number.

TAXPAYER APPEAL RIGHTS

This Notice of Decision constitutes the final position of the Department unless a Petition for Reconsideration is filed on a timely basis, in which event the Notice of Reconsideration will be the Department's final position. The requirements for a Petition for Reconsideration are set forth below. Pursuant to Section 72.011(2), F.S., and Rule 12-6, F.A.C., the assessment is final as of the date of this Notice of Decision unless you file a written Petition for Reconsideration postmarked within thirty (30) days of the date of this Notice of Decision and addressed to the Office of General Counsel, Technical Assistance and Dispute Resolution, Post Office Box 7443, Tallahassee, FL 32314-7443. The Petition for

Reconsideration *must* contain new facts or arguments; otherwise it is subject to dismissal.

Absent a timely filed Petition for Reconsideration, the assessment reflected in the Notice of Decision is final and you have three alternatives for further review:

1) Pursuant to Section 72.011, F.S., and Rule 12-6, F.A.C., you may contest the assessment in circuit court by filing a complaint with the clerk of the court. THE COMPLAINT MUST BE RECEIVED BY THE CLERK OF THE CIRCUIT COURT WITHIN SIXTY (60) DAYS OF THE DATE OF THIS NOTICE OF DECISION. Section 72.011(3), F.S., provides that no circuit court action may be brought unless you pay to the Department the amount of taxes, penalties and accrued interest assessed by the Department which are uncontested and tender or post a bond for the remaining disputed amounts unless a waiver is granted as provide din that section. Failure to pay the uncontested amounts will result in the dismissal of the action and imposition of an additional penalty in the amount of twenty-five percent (25%) of the tax assessed. The requirements of Chapter 72, F.S. are jurisdictional;

2) Pursuant to Sections 72.011, 120.569 and 120.57, F.S. and Rule 12-6, F.A.C., you may contest the assessment in an administrative forum by filing a petition for a Chapter 120 administrative hearing with the Department of Revenue, Office of General Counsel, Post office Box 6668, Tallahassee, FL 32313-6668. THE PETITION MUST BE RECEIVED BY THE DEPARTMENT WITHIN SIXTY (60) DAYS OF THE DATE OF THIS NOTICE OF DECISION. The petition should conform to the requirements of Rule 28-5.201, F.A.C. Before you file a petition under Chapter 120, F.S., you must pay to the Department the amount of taxes, penalties and accrued

interest which are not being contested. Failure to pay those amounts will result in the dismissal of the petition and imposition of an additional penalty in the amount of twenty-five percent of the tax assessed. The requirements of Section 72.001(2) and (3)(a) are jurisdictional for any action contesting an assessed or refund denial under Chapter 120, F.S.,; OR

3) Pursuant to Section 120.68, F.S., you may contest the assessment in the appropriate district court of appeal by filing a Notice of Appeal meeting the requirements of Rule 9.110, Florida Rules of Appellate Procedure, with (i) the Clerk of the Department of Revenue, Office of General Counsel, Post office Box 6668, Tallahassee, FL 32314-6668 and (ii) with the clerk of the appropriate district court of appeal, accompanied by the applicable filing fee. THE NOTICE OF APPEAL MUST BE FILED WITH BOTH THE DISTRICT COURT OF APPEAL AND THE DEPARTMENT OF REVENUE WITHIN THIRTY (30) DAYS OF THE DATE OF THIS NOTICE OF DECISION.

For appellate review purposes the Department will treat factual matters asserted in a protest or petition for reconsideration as allegations, not as established facts.

Should you have any further questions concerning this matter, please do not hesitate to contact me.

Sincerely,

/s/
Gary A. Moreland
Tax Conferee
Technical Assistance and Dispute Resolution
(850) 922-4831

GAM/gm
Enclosure: Computation of Total Liability
cc: Compliance Enforcement

NOTICE UNDER THE AMERICANS WITH DISABILITIES ACT

Persons needing an accommodation to participate in any proceedings before the Technical Assistance and Dispute Resolution Office, should contact the office at (850) 488-0717 (voice), or 1-800-DOR-8331(TDD), at least five working days before such proceeding. You may also call via the Florida Relay System at 1-800-955-8770 (voice), or 1-800-955-8771 (TDD).